82-277

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MENDEL SCHWIMMER d/b/a
SUPERSONIC ELECTRONICS CO.,

Petitioner,

–against–

SONY CORPORATION OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the conflict among the circuits after *GTE Sylvania* should be resolved by upholding Sherman Act vertical conspiracy cases premised upon responsive action to customer complaints?

2. What is the evidentiary "field of vision" to be applied in ruling upon motions for judgment *n.o.v.*?

3. When must a Court of Appeals remand to the district court a verdict-winner's request for an opportunity to make a new trial motion based upon the exclusion of material evidence?

STATEMENT PURSUANT TO SUPREME COURT RULES 21 AND 28.1

The parties to the proceedings are those listed in the caption.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The following opinions of the Court of Appeals and of the district court are set forth in the appendices in chronological order:

The opinion of the district court denying Sony's motion for summary judgment is reported at 1980-81 Trade Cas. [CCH] ¶63,580 (1980) and is set forth in Appendix A.

The opinion of the district court denying Sony's motion for judgment *n.o.v.* is reported at 1980-81 Trade Cas. [CCH] ¶63,766 (1981) and is set forth in Appendix B.

The opinion of the Court of Appeals reversing the denial by the district court of Sony's motion for judgment *n.o.v.* is officially reported at 677 F.2d 946 (2d Cir. 1982) and is set forth in Appendix C.

The order of the Court of Appeals denying Supersonic's motion to modify the judgment to remand for a new trial motion, not officially reported, is set forth in Appendix D.

The order granting Supersonic's motion to correct certain factual statements in the opinion of the Court of Appeals, not officially reported, is set forth in Appendix E.

The judgment entered by the Court of Appeals is set forth in Appendix F.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on May 3, 1982. Petitioner filed a motion to amend the Second Circuit's judgment to remand for a new trial motion. The motion was denied without opinion on June 30, 1982. This Court granted petitioner's motion for an extension of time in which to file the instant petition. The order granting the extensions is dated July 23, 1982, and provides for an extension until August 16, 1982.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The federal statutory provisions involved are:

(a) Section 1 of the Sherman Act, 15 U.S.C. §1, which states:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof,

shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(b) Rule 50 of the Federal Rules of Civil Procedure, which provides, in relevant part:

> **(b) Motion for Judgment Notwithstanding the Verdict.** Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.
>
> **(c) Same: Conditional Rulings on Grant of Motion.** (1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or

denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) Same: Denial of Motion. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

STATEMENT OF THE CASE

This case presents the Court with an opportunity to resolve a conflict among the Courts of Appeals as to whether concerted action is still implied as a matter of law under § 1 of the Sherman Act, 15 U.S.C. § 1, or whether a "contract or agreement" is now required. The conflict arose because of a change in legal standards adopted by two circuits after this Court's decision in *Continental T.V. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

The Second Circuit in this case joins the Third Circuit in holding that, as a matter of law, no "combination or conspiracy" can be established solely by proof that a manufacturer takes action to stop price-cutting in response to pressure from non-price-cutting customers.

The Seventh and Eighth Circuits have explicitly rejected these holdings and have ruled that proof of acts such as termination in response to competitor complaints is sufficient evidence of concerted action under Section 1. These circuits base their holdings on earlier decisions of this Court. Because the conflict involves a heavily-litigated question which has been addressed by a number of circuits, and because important legal and economic policies are at issue, the conflict should be resolved by this Court.

This case additionally presents the opportunity to dispel the confusion among the circuits concerning the standard for appellate review of jury verdicts. The Second Circuit has joined a number of other circuits in holding that it may review *all* evidence presented at trial, and that it may disregard the verdict-winner's proof if it is contradicted by any other testimony. Other circuits follow a more restrained practice. Resolution of the issue will have a significant impact on the question of how meaningful the role of the jury remains. This Court recently spoke on the limits of appellate review of bench trials.[1] A pronouncement on jury trials is needed.

A. The Proof At Trial

Until 1975, Sony Corporation of America ["Sony"] enforced resale price restrictions on its customers. It did so under the umbrella of the Fair Trade Laws. [Tr. 142][2] At the end of 1977, claiming that it was protected by *Continental T.V.* v. *GTE Syl-*

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[1] *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, ___U.S. ___, 72 L. Ed. 2d 606 (1982); *Pullman-Standard, Div. of Pullman, Inc.* v. *Swint*, ___U.S. ___, 72 L. Ed. 2d 66 (1982).

[2] "Tr." refers to pages of the trial transcript.

The Fair Trade Laws enacted in many states permitted resale price maintenance. These laws were repealed by Congress in 1975. 15 U.S.C. § 1.

vania, Sony accomplished the same result by imposing a new dealer contract which prohibited transshipping [Tr. 578].[3]

In the interim period between April, 1975 and the end of 1977, Sony pursued similar anti-competitive measures on a covert basis. The jury found that during that time Sony had "combined and conspired with certain of its dealers and distributors to discourage transshipping and discounting."

The "certain dealers" were key accounts such as department store chains and dealer buying groups.[4] The sudden elimination of fixed prices had resulted in widespread discounting of Sony products and precipitated a crisis with a number of these accounts. Sony began to receive regular complaints from Macy's, Bloomingdale's, Gimbels, Federated Department Stores, and others who sold goods at or around Sony's suggested prices. They met frequently with top Sony executives and requested that Sony take some action to insulate them from competition from transshippers.

The transshipping problem was constantly raised at regional sales meetings, general managers' meetings, and official headquarters meetings within Sony. Some Sony executives felt that holding the credit lines of large transshippers to an artificially low level would help, for it was a "legal way to maintain stability." [Tr. 228]. Accordingly, Sony froze the credit limits of certain large New York area transshippers, including Supersonic Electronics Co. ["Supersonic"], a dealer that had achieved three million dollars in sales in its first year as a Sony customer [Tr. 418].

The executives also decided to introduce special "shelter models", which Sony offered to a select group of non-discounting

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[3] "Transshipping" refers to the sale by one dealer to another dealer, usually in a different geographic area, and always at heavily-discounted prices. Sony believed that the *GTE Sylvania* decision permitted resale restrictions if it could assert business justifications for those restraints. [Tr. 875].

[4] Each buying group was comprised of scores of independent dealers who benefited from volume discounts and other group buying advantages. There may have been a handful of transshippers among the hundreds of dealers in these groups. It was undisputed that some of the most vociferous anti-transshipping complaints came from the buying groups [Tr. 331].

national accounts. Both Federated Department Stores and Macy's had pushed Sony to adopt this procedure as a measure to counter "price erosion". [Tr. 464].[5]

At or about the same time, Sony gave major discounts and extended payment terms on two important television models to select national accounts, because these accounts "would advertise the merchandise at full retail price." [Tr. 653]. Sony also moved 1000 popular television models out of the New York area because:

> "[I]f we were concerned about price deterioration on new merchandise . . . and that if the complaints were that . . . there was discounting and price erosion on these models, that perhaps if he [the New York area manager] didn't have these models in the market place this would not happen." [Tr. 482][6]

During this time period, Sony's vice-president, Ray Steiner, promised an Abraham & Straus executive that Sony was "working on programs to help him out . . . and that there were going to be changes in our program to help reduce the transshipping and price-cutting. We are going to have some stability."[7]

At the same time, Vernon Brisson, another Sony executive, promised one complaining Texas dealer that:

> "[W]e will try to help you in every possible way with the marketing problems you are experiencing.
>
> * * *
>
> "As for the account in Yonkers, N.Y., who is supposedly shipping to the Texas area, I have been unable to

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[5] The Second Circuit found this to be responsive to the customers' pressure, but discounted the evidence on the basis that the shelter model program was not successful. [App. C, p.23c]. The court also stated that there was other testimony that could contradict this proof, such as the "appearance" that other models were not kept from transshippers at the time.

[6] Sony also put one salesman in charge of all New York-area transshippers, paid him no commission, and only partially filled his customers' orders.

[7] The Second Circuit discounted this first-hand testimony, which came from the former head of Sony's New York region, because it was "not confirmed" by other participants. [App. C, p.6, n.4].

> gather any information on this account. To the best of my knowledge, we do not sell this particular account."
>
> "We shall continue to exert all effort to aid you to improve your market conditions." [App. C, p.19c, n.12][8]

Certain customers informed Sony that more was needed. At least one customer stopped purchasing for some time.[9] By the end of 1976, Sony's executives discussed steps which they characterized as "not legal."[10] [Tr. 550]. As a Sony employee explained:

> "Harvey [Schein, Sony's President] gets upset [at headquarters meetings] because he feels the transshipper is taking the business away from the department stores. He says how the hell could the department stores sell when they can't advertise the price. . . . So Harvey feels that *if we put the clamps on the transshippers*, . . . then the department stores would buy more from us. . . ." [emphasis added] [Tr. 1194 (tape)].

Sony's vice-president then clarified that "the clamps" were already being applied:

> "Ray Steiner says . . . we just can't do it overnight, but *we are slowly putting the pressure on . . . to slow them down*. We just can't kick out the business right away." [emphasis added] [Tr. 1194 (tape)].

As time passed, Sony's "clamps" on transshipping grew tighter. After receiving complaints about Supersonic's marketing practices, Sony forced Supersonic in early 1977 to agree not to

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[8] The Second Circuit held that neither the letter nor Mr. Brisson's effort to search for the identity of the violator was "action", and was therefore not evidence of conspiracy. [Appendix C, p.20, n.13].

[9] Abraham & Straus. According to Sony's former president, Gimbels also stopped purchasing for some time. [Tr. 879]. Macy's, not satisfied with shelter models, sold its own line in addition to selling Sony [Appendix C, p.20]. The Second Circuit used this evidence to negate all of the conspiracy proof. There is a question as to whether the reverse inference may be taken from this evidence.

[10] One Sony witness claimed that:

"If anything happens everything is verbal, they won't give it to me in writing. They're going to say I never said it, and I am going to say I never heard it." [Tr. 420].

ship to Florida as a condition of receiving more merchandise. [Tr. 313]. Thereafter, Supersonic was instructed not to sell outside the New York area, and, in a tape-recorded conversation, two Sony executives agreed that, if they got "any static that he's out of his market," then they would "clamp him up completely." [Tr. 316]. By the end of 1977, in response to customer pressure [Tr. 568], Sony instituted its anti-transshipping contract.

The Second Circuit found that with respect to all complaints, "the evidence was that Sonam responded that it could do nothing to restrict transshipping" [Appendix C, p. 19].

In mid-1977, Supersonic, along with eight other New York area transshippers and discounters, was suspended by Sony. The circumstances of the suspension were exhaustively litigated at trial, where the dispute centered about Sony's claim that Supersonic had been suspended for claiming advertising credits[11] for ads that in fact had never run. Supersonic countered with evidence indicating that months earlier Sony's president, Harvey Schein, had decided to go after a handful of transshippers under the pretext of a "spot check" of advertising credit claims. The investigation was expanded to two more transshippers, and, ultimately, to another two who used the same advertising agency. The district court summarized the proof on this issue and concluded that:

> "[I]n the early part of 1977 Sony, though it had not uniformly enforced its cooperative advertising program in the past, chose to enforce it against nine transshippers whom it suspended for a period of up to two months for making claims for advertising which did not run.
>
> "Sony had not previously suspended a customer for making such advertising claims. Nor had it required any

[11] Sony offered merchandise credits to dealers if the dealers submitted forms claiming that Sony advertising had been run by the dealer. A major portion of the trial was devoted to Supersonic's proof that Sony executives did not care if advertising was actually performed. Rather, the credits were viewed as an additional discount.

customer to submit affidavits[12] concerning its role in the making of such claims. To be sure, as Sony claims, the nine suspensions were made where it appeared that all nine had dealt with a single advertising agency and that Sony employees were involved in the scheme. But the jury was not required to infer that this was the only reason that Sony decided to institute the investigation and the suspensions while not taking similar action in other instances where advertising had not been shown to have run. The jury could also infer from the distaste with which Sony officials viewed transshipping and from their previous actions and their words (in particular those taped by Sadowy) that the suspensions were a signal and a warning to transshippers and a means of putting pressure upon them." [App. B, p. 36]

Sony suspended the transshippers and made no offer to resume sales.[13] It required affidavits from the transshippers in addition to repayment. Supersonic, knowing why Sony asked for the affidavit and not believing that Sony would resume sales absent a binding assurance, refused to give Sony the affidavit or money.[14] Supersonic requested further sales, but Sony refused.

In June, 1977, Supersonic filed this lawsuit alleging, *inter alia*, a violation of Section 1 of the Sherman Act. The jurisdictional bases for the claim were Section 4 of the Clayton Act, 15 U.S.C. § 15 and 28 U.S.C. §§ 1331 and 1337.

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[12] Facts which were not admitted into evidence explained Sony's reasons for requiring affidavits. Sony relayed these affidavits to the District Attorney's office for action. However, when the District Attorney suggested that Sony may have knowingly failed to enforce its cooperative advertising program, Sony refused to cooperate any further and the investigation was dropped.

[13] Sony first wrote to the dealers about possible reinstatement weeks after the suspensions. Sony eventually rehired seven of the nine dealers up to two months later. The eighth was initially rehired and then terminated two months later. By the end of 1977, all of the remaining transshippers were forced to sign a new agreement which prohibited transshipping.

[14] The district court explicitly found Supersonic's refusal to be "not unreasonable." [App. A, p.5a; B, p.3b].

B. The Jury Verdict

At the conclusion of the trial, the jury returned a verdict in favor of Supersonic for over $2 million dollars after trebling, exclusive of attorney's fees and costs. In a series of special interrogatories, the jury responded that in the years 1976 and 1977, Sony had "engage[d] in a combination or conspiracy with certain of its dealers and distributors to discourage transshipping and discounting." The jury also specifically found that Supersonic was terminated by Sony pursuant to that combination or conspiracy.

C. The Decision of the District Court

Following the trial, Sony moved for judgment notwithstanding the verdict pursuant to Fed. R. Civ. P. 50(b), raising principally the contention that Supersonic's termination had nothing to do with complaints Sony had received about transshipping and discounting. District Judge Eugene Nickerson, who presided at trial, denied the motion with a written opinion. [App. B]. As noted earlier, Judge Nickerson concluded that the jury could properly have found that the suspension of Supersonic and other transshippers was a means of "putting pressure upon them."

The trial court further held that there had been sufficient evidence that Sony's actions against price-cutters had been motivated by customer complaints to Sony, and by Sony's "consequent desire" to curb transshipping. Judge Nickerson concluded that "this is [not] a case where the evidence is of complaints without proof of a response by the defendant." [App. B, p. 3b]

D. The Decision of the Court of Appeals

On May 3, 1982, the Second Circuit reversed the judgment of the District Court and held that the trial judge should have granted Sony's motion for judgment *n.o.v.* [App. C]. After reviewing some, but not all, of the evidence, the Court quoted at length from its own recent decision in *H.L. Moore Drug Exchange* v. *Eli Lilly and Co.*, 622 F.2d 935 (2d Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3984 (U.S. May 28, 1982) (No. 81-2215), and held that Supersonic had failed to establish that Sony had conspired with any of the complaining dealers. According to

the Court, actions taken by a manufacturer in response to dealer complaints about price-cutting do not constitute a "combination or conspiracy" absent some further proof of "agreement" between the manufacturer and its dealers.

The Appellate Court did not reject the finding of the trial court that Sony's actions against the transshippers had been motivated by the complaints of other customers; indeed, Judge Kearse stated that there was some evidence of response [App. C, p.6, n.4; 22]. Rather, focusing on the supposed requirement of an "agreement", the Court parsed the proof and held that no such "agreement" had been established.[13]

Nor did the Second Circuit disturb Judge Nickerson's finding with respect to Sony's motive for the suspension of the transshippers [p. 9, *supra*]. The Court did not discuss that issue.

Finally, the Second Circuit reached its factual conclusions on the basis of a review of all the evidence presented by both sides. While not addressing the question directly, the Second Circuit declined to follow the standard of review adopted by the trial court, which was that: "the jury was not required to accept any of the testimony of Sony's executives and employees as to their motives or indeed as to any other fact not established by documentary evidence."

The Second Circuit ordered entry of judgment for Sony. Supersonic later moved to have the case remanded to the district court for consideration of a motion for a new trial based upon two important items of proof that had been excluded at trial. The panel denied the motion to modify the judgment without argument or opinion on June 30, 1982.

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[13] It is not our purpose in this petition to raise issues arising out of each of the omissions and factual errors in the Court's opinion. The Court's liberties with the facts, however, and its willingness to indulge in all inferences against the jury's verdict, bespeak a deeper philosophy which runs through all of the court's recent opinions in this area. It also brings to bear serious questions about the latitude of appellate review. *See* Part II, *infra*.

REASONS FOR GRANTING THE WRIT

I.
CERTIORARI SHOULD BE GRANTED IN ORDER TO RESOLVE THE CONFLICT BETWEEN THE POSITION OF THE SECOND AND THIRD CIRCUITS AND THAT OF THE SEVENTH AND EIGHTH CIRCUITS AS TO WHETHER A SHERMAN ACT CONSPIRACY MAY BE IMPLIED AS A MATTER OF LAW WITHOUT PROOF OF AN AGREEMENT OR CONTRACT

This case presents a conflict in the circuits that has arisen subsequent to, and because of, the decision in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

In the five years since *GTE Sylvania* was handed down, there has been a plethora of circuit court decisions examining anew the issue of what constitutes a vertical conspiracy under Section 1 of the Sherman Act.[16] Some of the courts have read *GTE Sylvania* as a signal to eliminate a large portion of vertical conspiracy cases.[17]

One method that the courts have used to accomplish this result has been the imposition of a new stringent requirement for proof

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[16] *See, e.g., Second Circuit: Oreck Corp.* v. *Whirlpool Corp.*, 639 F.2d 75 (2d Cir. 1980); *Borger* v. *Yamaha Int'l Corp.*, 625 F.2d 390 (2d Cir. 1980); *H.L. Moore Drug Exchange* v. *Eli Lilly and Co.*; *Venture Technology, Inc.* v. *Nat'l Fuel Gas Co.*, ___F.2d ___, No. 81-7069 (2d Cir. July 26, 1982).

Seventh Circuit: Spray-Rite Service Corp. v. *Monsanto Corp.*, ___F.2d ___, 1982-2 Trade Cas. [CCH] ¶64,808 (7th Cir. 1982); *Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, ___F.2d___, 1982-2 Trade Cas. [CCH] ¶64,744 (7th Cir. 1982).

Eighth Circuit: Battle v. *Lubrizol Corp.*, 673 F.2d 984 (8th Cir. 1982).

Third Circuit: Cernuto, Inc. v. *United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979); *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981).

[17] *GTE Sylvania* overruled the *Schwinn* doctrine, under which a great number of conspiracy cases had been brought. *GTE Sylvania* dealt primarily with the Rule of Reason treatment of conspiracies rather than with the definition of concerted action. However, the Court dealt extensively in *dicta* with the economic impact of vertical restraints. It is from this portion of the opinion that the lower courts appear to have drawn this signal.

of concerted action.[18] The Second and Third Circuits in particular have followed such a course.

In this case, the Second Circuit stated that there was: (a) "ample" proof of pressure from Sony's non-price-cutting customers [Appendix C, p.18c]; (b) evidence of Sony executives' desire to eliminate price-cutting or transshipping and of their actions taken to avoid "price erosion" [Appendix C, pp. 18c; 22]; and (c) testimony "indicating that a [Sony] executive responded . . ." [Appendix C, p.6, n.4] to customer pressure. The court nonetheless held that this and other responses to the complaints did not, as a matter of law, constitute concerted action because of the alleged absence of "any agreement between Sonam [and the customers] on the elimination of transshipping." [*Id.*][19]

The *Sony* holding conflicts with recent decisions in the Seventh and Eighth Circuits.[20] The Seventh Circuit, in *Spray-Rite Service Corp.* v. *Monsanto Co.*, ___F.2d ___, 1982-2 Trade Cas. (CCH) ¶64,808 (7th Cir. 1982) [reproduced in Appendix G], held that a vertical "combination or conspiracy" is still implied as a matter of law in the fact pattern presented here. The *Spray-Rite* court upheld a jury finding that Monsanto had "conspired with some of its distributors to fix the resale price of Monsanto herbicides," *i.e.*, a "general conspiracy" of the same nature as that in *Sony*:

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[18] One commentator recently claimed that the effect of *GTE Sylvania* is that lower courts are deciding for themselves what is "logical" in vertical restraint cases, and mentioned that this trend can be found in ". . . recent decisions concerning proof of conspiracy in the context of vertical restraints." Rosch, Conspiracy Law Breakthroughs, 50 Antitrust L.J. 347, 352 (1982).

Another way in which this result has been accomplished has been the imposition of a draconian standard of proof of interbrand competitive effect under the Rule of Reason. *See, e.g., Ron Tonkin Gran Turismo, Inc.* v. *Fiat Distributors, Inc.*, 637 F.2d 1376 (9th Cir. 1981); *Oreck Corp.* v. *Whirlpool Corp.*, *supra*; *Red Diamond Supply, Inc.* v. *Liquid Carbonic Corp.*, 1980-81 Trade Cas. (CCH) ¶ 63,825 (5th Cir. 1981); *Daniels* v. *All Steel Equip., Inc.*, 590 F.2d 111 (5th Cir. 1979).

[19] The word "agreement" is used at least ten times in the course of Judge Kearse's legal discussion.

[20] This position was taken by appellant in *Spray-Rite* in its Petition of Defendant-Appellant Monsanto Company for Rehearing, With Suggestion That Rehearing Be En Banc at p.3 (filed July 12, 1982).

> "Monsanto argues that evidence of price complaints coupled with evidence of termination in response to those complaints is insufficient to prove the existence of a resale price maintenance agreement. It relies on *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, [3d Cir.] . . .
>
> ". . . In *Battle* v. *Lubrizol Corp.* . . . , the Eighth Circuit declined to follow *Sweeney* and held 'that proof of a dealer's complaints to the manufacturer about a competitor dealer's price cutting and the manufacturer's action *in response* to such complaints would be sufficient to raise an inference of concerted action.' *Id.* at 991 (emphasis in original). We agree."[21] [App. G, p. 15g] [footnote and citations omitted]

The Eighth Circuit so held in *Battle* v. *The Lubrizol Corp.*, 673 F.2d 984, 991 (8th Cir. 1982). As the *Battle* court emphatically stated:

> "[W]e do not agree that 'even if appellants had demonstrated that Texaco's actions were in response to these complaints, such evidence would not show the necessary concerted action.' " 673 F.2d at 991.

In this case, the Second Circuit explicitly agreed with the Third Circuit's holding in *Sweeney*. [App. C, p. 18c]. Thus, both circuits now require more than a causal link between complaints and response in order to establish a conspiracy.

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[21] The court continued in its analysis to explain that:

"[A] terminated distributor presents sufficient evidence to support a verdict in its favor by proving (1) that the manufacturer received price complaints from the distributor's competitors, (2) that the manufacturer was concerned about raising its wholesale price and recognized that its ability to do so might be influenced by the distributor's prices, and (3) that the manufacturer terminated the distributorship." [App. G, p.16g].

In its Petition for Rehearing, Monsanto cites to an out-of-context sentence in the opinion and claims that the Seventh Circuit held that evidence of complaints followed by a termination, *without* proof of response, constitutes a conspiracy as a matter of law. As the above quotation indicates, that was not the holding. *See also Valley Liquors, Inc.* v. *Renfield Importers Ltd.*, ___ F.2d ___, *1982-2 Trade Cas. (CCH) ¶64,744 at 71,068 (7th Cir. 1982)*, where the Seventh Circuit so stated one month earlier in *dictum*.

The position adopted by the Second and Third Circuits runs counter to Supreme Court decisions. Under this Court's precedent, Section 1 does not require proof of any agreement; rather, the law implies a "combination or conspiracy" when a manufacturer, for anticompetitive reasons, takes action to limit discounting in response to customer requests for such action. *See United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960):

> "[A]n unlawful combination is not just such as arises from a price maintenance *agreement*, express or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy." 326 U.S. 43.

See also Albrecht v. *Herald Co.*, 390 U.S. 145 (1968); *Simpson* v. *Union Oil of California*, 377 U.S. 1 (1964); L. Sullivan, *Handbook of the Law of Antitrust* §139 (1977).[22]

The Second and Third Circuits have thus added one further requirement to this formulation: that of a contract or similar agreement. In so doing, those circuits have also rejected the long line of conspiracy decisions based upon a manufacturer's "mere receipt of complaints."[23] Historically, these decisions held that something more than the receipt of complaints was needed in order to establish a "combination". Complaints and responsive action were, in accordance with this Court's teaching, held to constitute the necessary proof as a matter of law. Under the Second Circuit's ruling, this fundamental conspiracy principle has been effectively nullified.

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[22] "If the manufacturer received reports from retailers about the pricing policies of others and implied to them that it will take appropriate action, it will have done 'something more' than merely to announce its policy and then refuse to deal." *Id.* at 395.

[23] *See, e.g., Modern Home Institute* v. *Hartford Accident & Indemnity Co.*, 513 F.2d 102 (2d Cir. 1975); *Westinghouse Electric Corp.* v. *CX Processing Laboratories*, 523 F.2d 666 (9th Cir. 1975); *Klein* v. *American Luggage Works*, 323 F.2d 787 (3d Cir. 1963); *Baer* v. *Esprit de Corp.*, 1980-81 Trade Cas. [CCH] ¶ 63,614 (N.D. Cal. 1980); *A.G. Rogers Co.* v. *Merck & Co.*, 498 F.Supp. 5 (E.D. Tenn. 1980).

The effect of the Second Circuit's approach is sharply illustrated by the fact that the court was able to disregard undisputed evidence of a conspiracy. Sony's requirement that Supersonic agree not to ship to Florida, a requirement to which Supersonic was forced to adhere, was not ever mentioned by the court, much less acknowledged as proof of conspiracy itself.

The additional requirement imposed by the Second Circuit also permitted that court to ignore the otherwise dispositive evidence of conspiracy in *Sony*.[24] This conclusion is borne out by Judge Kearse's distinguishing of her earlier opinion in *Eiberger* v. *Sony Corp. of America*, 622 F.2d 1068 (2d Cir. 1980), where the court upheld a Section 1 conspiracy finding. *Eiberger* involved the same Sony management involved in this case. It too concerned restrictions against transshipping. And it covered a time period overlapping with that in the *Schwimmer* case. Judge Kearse held that *Eiberger* was different because "there was no question that there existed . . . contracts within the meaning of Section 1." [App. C, p.20c, n.13]. That is because in *Eiberger*, Sony utilized a warranty fee program contained in its dealer contract to effect its unlawful vertical restraints, whereas in *Schwimmer* Sony's covert activities were all "verbal".

This conflict among the circuits concerns an important and heavily-litigated issue. *See* P. Areeda, *Antitrust Analysis* 553 (2d Ed. 1974). It also brings to bear a drastic shift in the function of the appellate court in that the jury's role as the decision-maker no longer extends to finding "combinations or conspiracies" from inferential proof.[25]

Inherent in this conflict is also a recognition by some courts of the practical consequences wrought by the Second Circuit rule. It is rare in today's sophisticated business environment to find written contracts fixing prices or allocating territories. Indeed, it

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[24] The Second Circuit did not acknowledge, for example, Sony's requirement that Supersonic cease its sales to Florida; Ray Steiner's admission that pressure was already being "slowly" applied; Harvey Schein's decision to put "clamps" on the transshippers; and Judge Nickerson's explicit finding that this was not a case "of complaints without proof of a response by defendant." [App. B, p.3b].

[25] We respectfully direct the Court to the Petition for a Writ of Certiorari in *H.L. Moore Drug Exchange* v. *Eli Lilly and Co.*, *supra*, at pages 13-22.

was Sony itself that reminded the jury that "if anything happens, everything is verbal." If the issue is not resolved, it will be the law that a manufacturer may fix resale prices as long as it does not enter into formal contracts or agreements with its customers.

We respectfully submit that a writ of *certiorari* should be granted. The issue has received significant recent attention from a number of circuits and is ripe for review. The precepts which continue to underlie the Sherman Act should not be permitted to be undermined. *See American Soc'y of Mechanical Eng'rs, Inc.* v. *Hydrolevel Corp.*, ___U.S. ___, 72 L.Ed. 2d 330, 342-43 (1982).

II.
CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS CONCERNING THE "FIELD OF VISION" TO BE APPLIED TO THE EVIDENCE IN RULING UPON A MOTION FOR JUDGMENT N.O.V.

Petitioner respectfully urges this Court to close a major gap and resolve the uncertainty in a critical area of federal practice. The Second Circuit has adopted and applied the most controversial of three conflicting rules used by the courts in defining the "field of vision"[26] as to what evidence may be considered upon Rule 50(b) *j.n.o.v.* motions.

The district court held in this case that the evaluation of the evidence must be limited by the fact that the jury was not required to accept any of the interested, contradicted, or impeached testimony of Sony's executives and employees.[27] Under the so-called "all the evidence" standard, however, the Second Circuit held that such testimony must be considered, and it set aside the jury verdict on the strength of that testimony. Unless reversed, the action by the Second Circuit threatens to undermine the role of the jury under the Seventh Amendment as the

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[26] *Grayson* v. *Pride Golf Tee Co.*, 433 F.2d 572, 576 (1st Cir. 1970).

[27] *Schwimmer* v. *Sony*, 1980-81 Trade Cases ¶ 63,766 at p.78,088 (E.D.N.Y. 1980) [App. B, p.3b]

sole arbiter of the credibility of witnesses and the weight of the evidence.

This Court's approach to the "field of vision" issue was expressed in *Wilkerson* v. *McCarthy*, 336 U.S. 53, 57 (1949):

> "It is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given." *Id.* at 57.[28]

Under *Wilkerson*, the reviewing court on a *j.n.o.v.* motion is not permitted to consider testimony or other evidence offered by the verdict-loser which is inconsistent with the jury verdict. Only evidence which supports the verdict-winner is considered. However, it has been more than 20 years since this Court last addressed this issue.[29] As a result, significant conflicts and confusion have developed among the circuits with respect to the applicability of the *Wilkerson* standard.

Some courts have unilaterally expanded the "field of vision" to permit consideration of more than just the verdict-winner's evidence, but only to the extent that such additional evidence is uncontradicted, unimpeached and comes from disinterested witnesses.[30] *Layne* v. *Vinzant*, 657 F.2d 468, 472 (1st Cir. 1981);

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[28] *See also Webb* v. *Illinois Cent. R.R. Co.*, 352 U.S. 512, 513-514 (1957); *Lavender* v. *Kurn*, 327 U.S. 645, 653 (1946).

[29] Between 1930 and 1962 this Court dealt extensively with the criteria for ruling upon motions for a directed verdict or judgment *n.o.v.* *See, e.g., Gunning* v. *Cooley*, 281 U.S. 90, 94 (1930); *Berry* v. *United States*, 312 U.S. 450, 452 (1941); *Brady* v. *Southern Railway Co.*, 320 U.S. 476, 479 (1943); *Tennant* v. *Peoria and Pekin Union Ry. Co.*, 321 U.S. 29, 34-35 (1944); *Lavender* v. *Kurn*, 327 U.S. 645, 653 (1946); *Wilkerson* v. *McCarthy*, 336 U.S. 53, 57 (1949); *Stone* v. *New York, Chicago & St. Louis R.R. Co.*, 344 U.S. 407 (1953); *Webb* v. *Illinois Cent. R. Co.*, 352 U.S. 512, 513-514 (1957); *Continental Ore Co.* v. *Union Carbide*, 370 U.S. 690, 696 n.6, 701 (1962).

[30] Courts which have done so attempt to bypass the *Wilkerson* rule by limiting *Wilkerson* to its own facts, *i.e.*, actions brought pursuant to the Federal Employers' Liability Act (FELA). *See, e.g., Dehydrating Process Co.* v. *A.O. Smith*, 292 F.2d 653, 656 n.6 (1st Cir. 1961). The validity of this approach has been questioned:

Carlson v. *American Safety Equipment Corp.*, 528 F.2d 384, 385 (1st. Cir. 1976); *Grayson* v. *Pride Golf Tee Co.*, 433 F.2d 572, 576 (1st. Cir. 1970); *Dehydrating Process Co.* v. *A.O. Smith Corp.*, 292 F.2d 653, 656 n.6 (1st Cir. 1961).[31]

The Fifth Circuit, however, has held that the courts are free to consider "all the evidence". *Boeing Co.* v. *Shipman*, 411 F.2d 365, 374-5 (5th Cir. 1969). Under this standard, the verdict-loser's evidence must be considered even if it is contradicted, impeached, or comes from interested witnesses.[32] This Court has not yet dealt with the issues arising from these departures from *Wilkerson*.[33] As noted by a leading commentator:

> The language of the opinions from the lower courts has been divided. Some of the cases have followed *Wilkerson* and have said that only the evidence favorable to the party against whom the motion is made may be considered. Others say that the court is to consider all the evidence while still others say that it may look to the favorable evidence and to unfavorable evidence that

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"It is extremely important to know whether the [Supreme Court's] decisions are confined to the particular statutory actions in which they have been handed down, or whether they represent a construction of the Seventh Amendment, and thus are controlling in all jury cases in federal courts. To this question there are powerful arguments both ways, and no very clear answer."

* * *

"A decision by the Supreme Court, clearly stating which view it takes as to the scope of the FELA and Jones Act decisions, would be of helpful guidance to the lower federal courts." 9 C. Wright & A. Miller, Federal Practice and Procedure § 2526 at 556, 559 (1971).

[31] The Third and Seventh Circuits have also adopted this view. *Inventive Music Ltd.* v. *Cohen*, 617 F.2d 29, 33 (3d Cir. 1980); *Fireman's Fund Ins. Co.* v. *Videfreeze Corp.*, 540 F.2d 1171, 1178 (3d Cir. 1976); *Panter* v. *Marshall Field & Co.*, 646 F.2d 271, 281-2 (7th Cir. 1981); *Brunner* v. *Minneapolis St. Paul and Sault Ste. Marie R.Co.*, 240 F.2d 608, 609 (7th Cir. 1957).

[32] *See, e.g.*, *Ralston Purina Co.* v. *Hobson*, 554 F.2d 725, 728-729 (5th Cir. 1977). *See also Matador Drilling Co. Inc.* v. *Post*, 662 F.2d 1190, 1196 (5th Cir. 1981); *Fenner* v. *General Motors*, 657 F.2d 647, 649 (5th Cir. 1981); *Spurlin* v. *General Motors*, 528 F.2d 612, 615 (5th Cir. 1976).

[33] It appears that only the Eighth Circuit continues to apply a rule which is essentially the same as that in *Wilkerson*. *See Simpson* v. *Skelly Oil Co.*, 371 F.2d 563, 567 (8th Cir. 1967). *See also Russell* v. *United Parcel Serv., Inc.*, 666 F.2d 1188, 1191 n.5 and accompanying text (8th Cir. 1981).

is uncontradicted and unimpeached. 9 *C. Wright & A. Miller, supra,* § 2529 at 572, 573.

The Second Circuit has now [34]adopted the "all the evidence" standard. By considering "all the evidence" and accepting as true testimony by interested, contradicted and impeached witnesses for the verdict-loser, the Second Circuit has weighed the evidence and substituted its own judgment for that of the jury.

For example, the court stated its conclusion that there was insufficient evidence of an agreement to discourage transshipping or discounting because all of *Sony's witnesses* testified that Sony's response to complaints about transshipping was that it could not do anything about the practice. 677 F.2d at 948. [App. C, p.19c]. This testimony was contradicted by the oral testimony of a former high-ranking Sony executive who testified at length regarding Sony's secret anti-transshipping activities. The Court deemed that his testimony could not be credited because it was not "confirmed" by other Sony employees. 677 F.2d at 948, n.4. [App. C, p.6, n.4]. Documentary evidence showing that a Sony official had promised to take action against transshipping was also not credited by the court on the strength of a Sony witness who sought to downplay its significance. *Id.* at 953, n.12 [App. C, p.19, n.12].

Similarly, the Second Circuit held that no inference of conspiracy could be drawn from the sudden reversal of the prior policy of lax enforcement of the advertising program, because a Sony witness testified that his motive in conducting it had been unrelated to transshipping. *Id.* at 949. [App. C, p.20c].

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[34] The Court noted: "If, however, *after viewing all the evidence* most favorably to plaintiff, we cannot say that the jury could reasonably have returned the verdict in his favor, our duty is to reverse the judgment below." *Schwimmer* v. *Sony*, 667 F.2d at 952, [App. C, p.15c] *quoting Moore* v. *Lilly*, 662 F.2d 935, 941. Judge Mansfield's use of the term in *Moore* v. *Lilly* was based upon a quote from his own earlier opinion in *Michelman* v. *Clarke-Schwebel*, 534 F.2d 1036, 1042 (2d Cir. 1976). In *Michelman*, too, the standard was employed without any discussion. Inexplicably, Judge Mansfield had, prior to his *Michelman* opinion, explicitly rejected the "all the evidence" standard, holding that "evidence unfavorable to it [the verdict-winner] may be considered only if that evidence stands uncontradicted and unimpeached." *Bigelow* v. *Agway, Inc.*, 506 F.2d 551, 554 (2d. Cir. 1974). It is perhaps significant that in *Michelman* the jury verdict was set aside, while in *Bigelow* it was upheld. *See also Simblest* v. *Maynard*, 427 F.2d 1, 4-5 (2d. Cir. 1970).

In the face of evidence containing taped Sony admissions of a scheme to limit the credit lines of transshippers, and of Supersonic in particular, the court chose to accept the bland assertions of Sony's witnesses that the credit lines of transshippers were not low, and that Supersonic's concededly miniscule credit line was due to its first financial statement, which was "weak". [App. C, p.22c]. The Court did not credit plaintiff's evidence that the "weak" statement was prepared at the outset of plaintiff's business, and that his offer of a strong statement one year later was refused because it was "a bad time to ask". [Tr. 611].

Further examples abound.[35] The district judge heard the testimony of all of the witnesses, and held, in denying Sony's motion for judgment *n.o.v.*, that:

> "The jury was not required to accept any of the testimony of Sony's executives and employees as to their motives or indeed as to any other fact not established by documentary evidence." 1980-81 Trade Cas. ¶ 63,766 at p.78,088. [App. B, p.3b].

The jury's verdict was thus set aside by the Second Circuit on the basis of testimony which the district court had held the jury was not required to believe. The "all the evidence" standard served as a vehicle which enabled the Second Circuit to weigh the evidence and to substitute its own judgment for that of the jury.[36]

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[35] The court also downplays evidence of anti-competitive action by Sony on the unusual ground that the attempted action did not succeed, or that it was not as vigorously anti-competitive as it could have been. [App. C, p.22c] *See* n.5, *supra*. The situation here is comparable to the problem which this Court addressed in *Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, 370 U.S. at 701, n.10. *See also* the grant of *certiorari* in *Continental Ore*, 368 U.S. 886 (1962) (issue number 6).

[36] The Second Circuit's application of the "all the evidence" standard runs afoul of this Court's express direction in *Lavender* v. *Kurn*, 327 U.S. 645, 653 (1945) and *Gunning* v. *Cooley*, 281 U.S. 90, 94 (1930). It also violates this Court's earlier rulings that a jury is not required to accept the testimony of interested witnesses who are impeached by cross-examination. *See Chesapeake and Ohio Railway Co.* v. *Martin*, 283 U.S. 209 (1931); *Sonnentheil* v. *Christian Moerlein Brewing Co.*, 172 U.S. 401 (1899).

This standard has encountered widespread criticism among the legal commentators.[37] They have warned that the "all the evidence" approach when used by a court to set aside a jury verdict "comes dangerously close to weighing the evidence".[38] Permitting the courts to consider contradicted and impeached testimony from the verdict loser (particularly when it issues from interested witnesses) is also inherently destructive of, and contradictory to, the maxim that the evidence must be considered "in the light most favorable" to the verdict winner. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. at 696.[39]

In light of the series of cases, including the instant case, in which the Second Circuit has set aside jury verdicts based upon its own analysis of the evidence,[40] this Court should no longer permit the

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[37] *C. Wright and A. Miller, supra*, § 2529 at 573; Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 Minn. L. Rev. 903, 948-953 (1971); Bagalay, *Directed Verdicts and The Right to Trial by Jury in Federal Courts*, 42 Tex. L. Rev. 1053, 1062-63 (1964); James, *Sufficiency of the Evidence and Jury-Control Devices Available Before Verdict*, 47 Va. L. Rev. 218, 226 (1961).

[38] *C. Wright and A. Miller, supra*, § 2529 at 571; *Cooper, supra* at 952.

[39] The Second Circuit's articulation of the *j.n.o.v.* standard highlights this. The court now posits the rule as requiring that "all the evidence" be viewed "without weighing the credibility of the evidence." If the court is to consider all the evidence, but may not take into account questions of credibility, the verdict loser's testimony gains equal footing with that of the verdict-winner. The "without weighing the credibility of the evidence" rule operated in the verdict winner's favor so long as only his evidence was considered under the *Wilkerson* rule. The present articulation allows the court to disregard the fact that witnesses whose testimony is inconsistent with the verdict were not credited by the jury. As applied to a hostile witness whose testimony is viewed under the "all the evidence" standard, the "in the light most favorable" requirement becomes meaningless.

[40] The Second Circuit has indicated that it intends to use its extreme treatment of the evidence in this case as a model for future decision-making. In the recent case of *Unijax, Inc.* v. *Champion Int'l, Inc.*, ___F.2d ___, 1982-2 Trade Cas. [CCH] ¶ 64,814 (2d Cir. 1982), the Second Circuit, although writing on an unrelated "tying" issue, declared that *Moore* v. *Lilly* and *Schwimmer* v. *Sony* were "two cases pointing to the correct decision in this case" because in those cases there was also "insufficient evidence" to support plaintiff's claim. Even more unsettling is the *Unijax* court's conclusion that "[t]he Unijax case presents an *a fortiori* situation" to *Moore* and *Schwimmer* because the trial and appellate courts were in agreement on the insufficiency of the evidence. *See also Venture Technology, Inc.* v. *Nat'l Fuel Gas Co.*, ___F.2d ___, No. 81-7069, (2d Cir. July 26, 1982) (raising many of the same issues presented here).

uncertainty surrounding the standards governing *j.n.o.v.* motions. The conflict and disarray among the circuits requires this Court's intervention.[41] In view of the manifest injustice which results from the "all the evidence" rule, this Court should either reaffirm *Wilkerson*[42] or adopt the first Circuit rule,[43] as did Judge Nickerson in the district court below.

III.
CERTIORARI SHOULD BE GRANTED TO ESTABLISH WHEN A COURT OF APPEALS MUST REMAND A NEW TRIAL MOTION TO THE TRIAL COURT

This case presents for resolution the question of whether a verdict-winner who is reversed by the Court of Appeals for insufficiency of the evidence has the right to return to the trial judge on remand to fill the crucial gap in the evidence in a motion for a new trial. This question has emerged as a recurring issue in federal court practice.

Until 1967, it would have been clear under this Court's decisions that remand to the trial court was appropriate where evidentiary exclusions were raised in a new trial motion. This was the rule established in *Cone* v. *West Virginia Pulp & P. Co.*, 330 U.S. 212 (1946). In *Cone*, the Court held that the trial court is uniquely competent to determine the propriety of a new trial, a determination which "calls for the judgment in the first instance

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[41] *See also* Judge Rives' vigorous dissent to the court's analysis in *Boeing*:

"With deference, I submit that when the majority repudiates for diversity cases the FELA standard and particularly the formula adopted in *Lavender* v. *Kurn*, 1946, 327 U.S. 645, 66 S.Ct. 740, it commits an error of constitutional proportions which will continue to plague this Court and the district courts of this Circuit until the Supreme Court grants certiorari in this or some future case, and corrects the error." *Boeing* v. *Shipman*, 411 F.2d at 377-78.

[42] The departure from *Wilkerson* has been said to create a "hybrid" rule which intermingles the standards governing motions for directed verdicts with those governing motions for a new trial. *See California Computer Products, Inc.* v. *Int'l Bus. Machines*, 613 F.2d 727, 733, n.3 (9th Cir. 1980).

[43] The commentators discussed above unanimously prefer this approach. *See also* J. Moore and J. Lucas, 5A Moore's Federal Practice ¶ 50.02[2] at 50-38 and 50-39 (2d Ed. 1982).

of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart." 330 U.S. at 216 [citations omitted].[44]

Subsequent Supreme Court rulings have cast serious doubt on the current viability of this policy. For example, in *Neely* v. *Eby Construction Co.*, 386 U.S. 317 (1967), the Court held that the Courts of Appeal had the power under Rule 50, F.R. Civ.P., to determine new trial motions. This ruling appeared to emasculate the *Cone* doctrine.[45] As a result, the Courts of Appeal have typically determined new trial motions on their own authority rather than remanding for the more appropriate consideration of the trial court.

Later pronouncements by members of this Court strongly suggest, however, that *Cone*'s strong policy requiring remand to the trial court in certain cases should still remain the favored approach taken by appellate courts.[46]

The continued viability of the *Cone* doctrine was most recently indicated by members of this Court in the separate opinion of Justices White and Brennan in *United States* v. *Generes*, 405 U.S. 93 (1972). At least with respect to reversals on evidentiary grounds, the Justices noted:

> "This Court has often repeated that a trial court is the most appropriate tribunal to determine such factual questions, . . . since appellate courts are awkwardly equipped to resolve such issues, particularly in the absence of adversary argument, and since the trial judge

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[44] Other "practical reasons why a litigant should not have his right to a new trial foreclosed without having had the benefit of the trial court's judgment on the question," 330 U.S. at 217, include the litigant's belief that "he could fill the crucial gap in the evidence." *Id.*

[45] *See* Louis, Post-Verdict Rulings on the Sufficiency of the Evidence: *Neely* v. *Martin K. Eby Construction Co.* Revisited, 5 Wisc. L. Rev. 503 (1975).

[46] Thus, in *Iacurci* v. *Lummus Co.*, 387 U.S. 86 (1967), this Court held that on appeal by the respondent who failed in its motion for *j.n.o.v.*, the Court of Appeals, in reversing, should have remanded to the trial judge, who was in the best position to pass upon the question of a new trial "in light of the evidence, his charge to the jury, and the jury's verdict and interrogatory answers, Fed. Rule Civ. Proc. 50(d)." 387 U.S. at 88.

> has an extensive and intimate knowledge of the evidence and issues 'in a perspective peculiarly available to him alone.' *Cone* v. *West Virginia Pulp and Paper Co.*, *supra* 216, 91 L.Ed. at 852, 67 S. Ct. 752. I would therefore allow the trial court to decide whether a new trial is merited in this case." 405 U.S. at 113 (Opinion of White, J. and Brennan, J.) [citations omitted].

In this case, similarly, critical items of Supersonic's proof were excluded by the trial court, on the grounds that relevance did not outweigh the prejudice to Sony. First, the trial court excluded evidence that Sony furnished the affidavits it received from the transshippers to the District Attorney for criminal action, thereby excluding an important contradiction of Sony's contention that it wished solely to recover the advertising monies. The trial judge also excluded the decision in *Eiberger* v. *Sony Corp. of America*, which evidenced Sony's similar plan and intent to curb transshipping and discounting. Remand is particularly appropriate because the Court of Appeals reversed Supersonic's verdict on the grounds that there was insufficient evidence in its support.[47]

Certiorari is required, therefore, to clarify *Cone* and *Neely* and to delineate for Courts of Appeals those cases where remand to the trial court is required.

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[47] This is particularly appropriate where, as here, the trial court's evidentiary exclusions were on the grounds that their probative value was outweighed by their prejudice to Sony, under F.R. Evidence 403. *See also* Petition for a Writ of Certiorari in *Moore* v. *Lilly*, *supra*, at 22-28.

CONCLUSION

It is respectfully requested that a writ of certiorari issue to review the judgment of the United States Court of Appeals.

Respectfully submitted,

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August 16, 1982